Supreme Court, U.S.
FILED

CASE NO. 95-305 AUG 22 1995

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 199___

KENNETH M. PLAISANCE,
Petitioner,

v.

TRAVELERS INSURANCE CO., Et Al.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts committ manifest error and violate 28 U.S.C. section 636(b)and(c) by appointing the magistrate(without the consent of the petitioner) to dispose of the case, and did they committ **manifest injustice** by adopting the magistrate's recommendation to deny petitioner's motion for summary judgment and denying petitioner right to trial by jury and then granting defendant's motion for summary judgment to dispose of the case?.

2. Did the U.S. District Court for the Northern District of Georgia(through the magistrate) affirmed by the U.S. Court of Appeals violate and circumvent applicant's constitutional right to a trial by jury as mandated by the Seventh Amendment of the U.S. Constitution and 42 U.S.C. Section 1981(a)(c) of the 1991 Civil Rights Act through Summary Judgment proceedings?

3. Did the lower courts committ manifest erred by denying plaintiff's motion for summary judgment based on Rule 36 of the Federal Rules of Civil Procedure?

4. Did the lower courts err by granting defendant's motions for summary judgment by failing to apply the "Governing Substantive law" of discrimination in connection with summary judgments as pursuant to Rule 56 of the Federal Rules of Civil Procedure?

5. Should Summary judgments be sparingly used and then only in rare instances. Pollar v. Columbia Broadcasting System, Inc., 368 U. S. 464, 473, 82 S.Ct. 486, 7 L.Ed 458, 464(1962), Adickes v. Kress, 398 U. S. 144, 90 S.Ct. 1598, 26 L.Ed. 142(1970), Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3rd Cir. 1991). Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Cir. 1991)?

6. Does this ruling set dangerous precedent that acts as a deterrent for persons with limited means to bring a discrimination claim.

B. **LIST OF PARTIES**

Names of all parties appear in the caption of the case.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

As far as Plaintiff is aware, the district court and court of appeals decisions are unreported. Both decisions are reproduced in the appendix.

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

(i) Date of Decisions of U. S. Court of Appeals for the Eleventh Circuit sought to be reviewed: May 24, 1995. (ii) None. (iii) Inapplicable. (iv) The statutory provision

believed to confer on this Court jurisdiction to review by writ of certiorari is 28 U.S.C. section 1254(1) et seq.

F. STATUTES AND REGULATIONS INVOLVED

Seventh Amendment of the U. S. Constitution
28 U.S.C. Section 636
28 U.S.C. Section 2071
42 U.S.C. Section 1981(a) (c)
Section 704 of Title VII, 42 U.S.C. section 2000(a)
Rule 36 of the Federal Rules of Civil Procedure
Rule 56 of the Federal Rules of Civil Procedure
Rule 2.25 of the Uniform Local Rules
of the United States District Courts for
the Norther District of Georgia
See Appendix

G. STATEMENT OF THE CASE

Petitioner brought this action seeking relief as authorized by Title VII of the Civil Rights Act as amended 1991, the 14th Amendment of United States Constitution, and damages for constructive discharge. Petitioner, a Techinical Specialist for Travelers' Insurance Co., Danver Office applied for a vacate techinical specialist position at Travelers--Atlanta Office. Petitioner also requested to be considered for a vacate supervisor position at Travelers' Danvers Office. Although petitioner was highly more qualified , respondent chose less qualified white Americans to file those job vacancy. On October 30, 1990, plaintiff filed with the Equal Employment Opportunity Commission, charging Travelers Insurance Co. with discrimination and retaliation. Plaintiff supplied the EEOC the names of several black employees for statements regarding racial discrimination. The EEOC failed to question the blacks employed by Travelers. On September 18, 1992, (two

years later) the EEOC Area Director, Charles Looney concluded based on faulty investigation that there was no evidence of racial animus towards the claimant, and determined that there was no violation of Title VII of the 1964 Civil Rights Statute. On December 18, 1992, appellant timely filed Civil Action No. 92-4184 in the U.S. District Court of the Eastern District of Louisiana.

FACT MATERAL TO THE QUESTIONS PRESENTED

1. On January 13, 1993, Petitioner propounded request for admission of facts upon Travelers. On January 25, 1993, defendant acknowledged receiving plaintiff's discovery. On March 10, 1993, Magistrate Lemelle of the Eastern District of Louisiana granted defendant a 30-day extension of time and ordered defendant to answer plaintiff's discovery after transferring the case to the Northern District of Georgia. On May 11, 1993, the case was assigned to Judge Robert Vining Jr., and was referred to Magistrate William L. Harper. On June 16, 1993, Ms. Dent, counsel for defendant, requested a leave of absence until October of 1993. The Magistrate Harper granted the leave of absence. Ms. Dent withdrew from the case. John Wymer, enrolled as substitute. On August 4, 1993, defendant answered the request. Traveler's admitted:

a. that it failed to promote or transfer eight Black americans but grant promotion/transfers to several White american,

b. that there are, or were no blacks in the Technical Special unit in the Atlanta Office,

c. that the manager of the Atlanta Office, received on or about January 12, 1990, petitioner's cover letter along with a resume requesting to be considered for

any Technical Specialist position that may become available,

d. That on December 29, 1989, Travelers Insurance Co., in Atlanta accepted petitioner's employment application requesting to be considered for any claims representative, technical specialist, or supervisory position.

e. That the salary of white persons hired in 1989 as a claims representative or technical specialist was much higher than blacks hired in that same year.

These admissions revealed discriminatory intent and illegal employment practices on the part of the defendant. Petitioner a Travelers' employee should not have been considered an outside candidate for the vacant job. Petitioner should have been hired for the position in Atlanta because of respondent's promote within policy. On September 24, 1993, plaintiff filed a motion for summary judgment based on the admissions. On November 30, 1993, the magistrate recommended denial of the motion for summary judgment and stated that the answer to the requests were timely.

2. On September 24, 1993, petitioner filed an **unopposed** demand for a jury trial in the form of a motion to amend. On November 30, 1993, the lower court conceded that the jury demand was unopposed but, recommended denial of petitioner's demand for a jury trial. On December 30, 1993, plaintiff requested additional time for discovery. Magistrate Harper denied plaintiff's request. On January 1, 1994, Judge Vining adopted the magistrate's recommendation.

3 On January 20, 1994, defendant filed a motion for Summary Judgment. On March 2, 1994, the magistrate recommended that defendant's motion for

summary be granted. On May 20, 1994, the district court adopted (without de novo review) the magistrate's recommendation and ruled in favor of defendant. Final judgment was entered on May 23, 1994. On June 1, 1994, plaintiff appealed from this decision. On May 24, 1995, without oral argument, the Eleventh Circuit affirmed the lower court's decision.

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The U.S. District Court for the Northern District of Georgia had original jurisdiction under related statutes: 28 U.S.C. section 1331, section 1343, section 1339, 42 U.S.C. section 2000e-5(f)(3), 42 U.S.C. section 1981(a)(c).

J. DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS FOR FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court on important issues that has created substantial uncertainty in the lower courts. The lower court's decision affects federal procedure and the constitutional right to a trial by jury being violated by summary judgment proceedings

1. The decision below conflicts with prior decision regarding 28 U.S.C. Section 636 (b)(1)(A) and (c) by designating the magistrate to hear and determine summary judgment without consent.

The purpose of 28 U.S.C. section 636(b) is to increase the efficiency of federal judiciary.[1] Mathews v. Weber, 423 U.S. 261, 96 S.Ct 549, 46 L.Ed 2d. 483 (1976)

According to Hall v. Sharpe, 812 F.2d 644,647 (11th Cir. 1987) the statute requires that parties and District Court **consent** to transfer the case to the

magistrate. Explicit, voluntary consent is crucial to this procedure, and concerns about the constitutionality of the conduct of trials and entry of judgment by non-Article III judicial officers. Consent also ensures against the wholesale delegation of certain classes of cases and **discrimination** among classes of litigants. The Article III judge should be the ultimate adjudicatory power.

Petitioner never agreed or consented to Magistrate Harper to conduct the proceedings of this case, thus, the district court violated (c) of 28 U.S.C. section 636. Furthermore, Magistrate Harper violated (b)(1)(A) and (B) of 28 U.S.C. section 636 because the magistrate may not hear or determine summary judgment.

In addition, according to LoConte v. Dugger, 847 F.2d 745, 750 (11th Cir. 1987 **cert. denied** 109 S.Ct 397 (1988), Hall v. Sharpe, 812 F.2d 644,647 (11th Cir. 1987),

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1. 28 U.S.C. section 636(b)(1

(A) provides that:

> Notwithstanding any provision of law to the contrary- a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, **except**... for summary judgment.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings. A judge of the court **shall** make a de novo determination of the report to which the objections are made.

(c) Notwithstanding any provision of law to the contrary--

> (1) **Upon the consent of the parties**, a full-time United States magistrate...may conduct any or all proceedings in a jury or nonjury civil matter..

Jeffrey v. State Board of Education Of the State of Georgia, 896 F.2d 507 (11th Cir. 1990), the 11th Circuit Court Appeals concluded that the district court **shall** conduct a de novo review of the magistrate recommendation and stated that a de novo review of the record is essential to the constitutionality of section 636. It requires independent consideration of factual issues based on the record. In the instant case, the district court failed to conduct a de novo review. Furthermore, in Henson v. Falls, 912 F.2d 977(8th Cir. 1990), the 8th Circuit Court of Appeals held that when de novo review is required, the district court must consider the actual testimony, not merely review the magistrate's recommendation. It goes on to say that when questions of fact are involved, our longstanding commitment to preserving a litigant's right to a jury trial dictates that the decision be rendered based on **a jury's consensus rather than on one mind**. Dace v. ACF Industries, Inc., 722 F.2d 376-377 (8th Cir. 1983). The court concluded that plaintiff was denied his Seventh Amendment constitutional right to a jury because the magistrate granted a directed verdict against the plaintiff. The court reversed the granting of a directed verdict and remanded the case for trial. What is significant about the **Henson case** is that the same requirement of a directed verdict-- giving the nonmovant the benefit of all reasonable inferences is found in a motion for summary judgment. In this case, the lower courts was biased and committed **manifest injustice** by adopting magistrate's recommendation to deny appellant's motion for summary judgment and then granting defendant's motion for summary judgment. The lower courts erred by denying petitioner's constitutional right to trial by jury through

summary judgment proceedings..

2. The decision below conflicts with prior decision regarding the court's failure to give full faith and credit to an order of another district court.

In January 1993, petitioner served defendant request for admissions of facts. The U.S. District Court for Eastern District of Louisiana ordered defendant, Travelers, to answer appellant's discovery request within 30 days after the determination of a transfer of the case. The case was transferred on May 11, 1994. The U.S. District Court for the Northern District of Georgia **totally disregarded the orders** of the United States District Court for the Eastern District of Louisiana and allowed the respondent until August 4, 1993 to answer. The courts below determined that discovery, in particularly, the request for admission of facts is subject to the jurisdiction of Local Rule 225-1(a)[2] of the U.S. District Court of the Northern District of Georgia. The lower courts were bias in their determination.

Petitioner disagrees that defendant responded timely and cites EEOC v. Jordan Graphics, Inc., 135 FRD 126 (WD,NC 1991), for the rule that the time to respond begins to run on the day the request for admissions are mailed, not from the time the party receives the request. The courts below erred and used the local rule in contravention to the Rule 36 of the Federal Rule of Civil Procedure and the United States Constitution. Petitioner strongly asserts that the Northern District of Georgia should have given full faith and credit of the order submitted by the Eastern District of Louisiana.

The Full Faith and Credit Clause of the United States Constitution [3] requires every state to accept as valid,

without reinvestigation on the merits, every judgment or orders of judicial proceeding rendered by a court of another state. Both the Eastern District of Louisiana and the Northern District of Georgia are subject to the federal constitution. The jurisdictional requirements that must be satisfied by both federal courts are the same. Therefore, under the federal due process clause and under the full faith and credit clause jurisdiction, any order or judgment rendered in one federal court should be recognized in another federal court. The Louisiana U.S. District Court's order should have been recognized by the U.S. Court for the Northern District of Georgia.

Furthermore, petitioner strongly asserts that local rule 225.1(a) of U.S. District Courts for the NorthernDistrict of Georgia is in violation of the U.S. Constitution by impairing due process and equal protection of law, and is in contravention to Rule 36 of the Federal Rules of Civil Procedure.

Furthermore, 28 U.S.C. section 2071 provides that the local rules of the District Courts shall be consistent with the rules of practice and procedure prescribed by the Supreme Court. Appellant cites Frazier v. Heebe, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987), as primary authority for the rule that the District Court has the discretion to adopt local rules that "are necessary to carry out the conduct of its business," **so long as the local rule is consistent with the Federal Rules of Civil Procedure.** If the District Court uses a local rule inconsistently with

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2. Local Rule 225-1(a) provides that:

> "discovery does not commence until "30 days after the appearance of the first defendant by answer to the complaint."

the principles of right and justice and arbitrarily rules against a party, the rule is improper and the action should be vacated and remanded. Local rule 225.1(a) is in contravention to Rule 36 of the Federal Rules of Civil Procedure. The Georgia District Court used the local rule to disregard appellant's factual evidence. If the request for admission of facts were allowed into evidence, it clearly and convincingly proves that the defendant statistically disallowed transfers to petitioner and other African-Americans within Travelers; revealed that the Atlanta Office had received plaintiff's resume and application; revealed that defendant stated that it was trying to fill the technical specialist position from within; and that plaintiff met cut off date for inside candidates. The evidence revealed that Plaintiff was the most qualified inside candidate for the position. To say otherwise would be pretext.

Furthermore, Article VI, section 2 of the United States Constitution declares that this Constitution, and the Laws of the United States... shall be the 'Supreme Law of the Land'... and the **Judges** in every State shall be bound

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3. Article IV Section 1 of the United States Constitution, 28 U.S.C. Section 1738, Full Faith and Credit Clause Provides: (In Pertinent Parts)

> The records and judicial proceedings of any Court of any such States, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within United States. Such Acts, records and **judicial proceedings** or copies thereof, shall have the same **full faith and credit** in every court within the United States as they have by law usage in the court of such State, from which they are taken...

thereby... The Supremacy Clause is relevant in this situation because it applies to the Federal Rule of Civil Procedure and it demands that judges in every state shall adhere to the Federal laws. The court below had an affirmative duty to apply Rule 36 of the Federal Rules of Civil Procedure to the instant case. Defendant delayed to answer seven months. Appellant strongly asserts that if there is any ambiguity or conflict of law between the Federal Rules and the local rules and between two U.S. Courts of Jurisdiction, the Federal Rules of Civil Procedure should preempt and take precedent over the United States District Court's local rules.

3. **The decision below conflicts with prior decision regarding Rule 36 of the Federal Code of Civil Procedure.**

Rule 36 of the Federal Code of Civil Procedure[4] is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect. Rule 36 serves two vital purposes, first to facilitate proof with respect to issues that cannot be eliminated from the case, and second, to narrow the issues by eliminating those that can be eliminated. Rule 36 clearly provides that a party must answer each admission within 30 days or the matter is deemed admitted. Several U.S. Court of Appeals have held that an admission of facts made under Rule 36 is an "unassailable
statement of fact that narrows the triable issues of the case." Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028, 1037 (3rd Cir. 1988). According to Rainbolt v Johnson, 669 F.2d 767 (D.C. 1981), the Court of Appeals reversed the lower court's ruling because it failed to give binding and conclusive effects to unanswered request for admissions.

The Court of Appeals ordered the lower court to give full effect to appellant's request for admissions, which were automatically deemed admitted because they were not answered within thirty days. This clearly indicates that the request for Admission of Facts is automatically deemed admitted if not answered within 30 days. Stubbs v. Commissioner, 797 F. 2d 936 (11th Cir. 1986). It also provides that a matter admitted is "conclusively established" and applies equally to those admissions made affirmatively and **those established by default.** An admission under Rule 36(a) is binding on the party making the admission and cannot be contradicted. Talley v. United States, 990 F.2d 695 (1st Cir. 1993), U.S. V. Kasuboski, 834 F.2d 1345 (7th Cir. 1987), Donovan v. Carls, 703 F.2d 650 (2nd Cir. 1983). Hulsey v. State of Texas, 929 F.2d 168 (5th Cir. 1991), American Auto. Ass'n v AAA Legal Clinic, 930 F.2d 1117 (5th Cir. 1991). According to United States v. Lane, 960 F.2d 126 (11th

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4. Rule 36 of the Federal Code of Civil Procedure provides:

> (a) **Request for admission.** A party may serve upon any other party a written request for the admission, of the truth of any matters within the scope of Rule (26) set forth... Each matter of which an admission is requested shall be separately set forth. **The matter is admitted unless, within 30 days after service of the request,...** the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter.... a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint....
>
> (b) **Effect of Admission.** Any matter admitted under this rule is conclusively established....

Cir. 1992), the 11th Circuit concluded that failure to respond to request for admissions conclusively established those facts sought by the moving party. Stubbs v. Commissioner, 797 F. 2d 936 (11th Cir. 1986). According to EEOC v. Jordan Graphics, Inc., 135 FRD 126 (WD,NC 1991), the time to respond begins to run on the day the request for admissions are mailed, not from the time the party receives the request. The courts below contradicts its own rulings.

The facts reveals that on January 13, 1993, petitioner served respondents a first set of Interrogatories and Request for Admission of Facts by the Louisiana Secretary of State.(See Record, **note: record pages are not numbered,** R. 19, Vol. 1, Certified Mail P431051815)

Defendant's failure to timely respond to request for admissions conclusively established that 1. the defendant discriminated against black employees in the area of promotion and transfers, and 2. established pretext because defendant received plaintiff's application, resume, and cover letter before June 29, 1990, the job vacancy cut off date for internal candidates. Petitioner was entitled to summary judgment because he established discrimination and because there were no disputed genuine issues to a material fact .

4. **The decision below affirmed by the 11th Circuit Court of Appeal conflicts with this court and other circuits regarding motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure when the party established conclusive facts through Request for admissions of fact.**

Admission made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment. Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985); Donovan v. Carls, 703 F.2d 650 (2nd Cir.

1983). Petitioner asserts that the trial court erred by failing to grant his motion for summary judgment as pursuant to Rule 56 of the Federal Rules of Civil Procedure[5] based on defendant's failure to respond to plaintiff's request for admission of facts. Appellant's motion for summary judgment which was not considered based on a local rule of the Northern District of Georgia revealed that Travelers statistically deprived several blacks (an identifiable group) from transfers and overlooked blacks in terms of promotions. The respondent failed to demonstrate that the challenged practice is job related. The information in the request for admission of facts revealed that Travelers statistically committed an unlawful employment practice based on disparate impact.

The 1991 Civil Right Act declares that facially neutral employment policies that have a disparate impact on protected groups are discriminatory and must be eliminated. The plaintiff must prove disparate impact by presenting statistical evidence that a particular employment practice of the defendant had an adverse impact on an identifiable group. Such evidence created a presumption of discrimination. In Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 1089, 28 L.Ed 2d 158 (1971), and Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct.2777, 101 L.Ed. 2d 827 (1988) the U.S. Supreme Court held the employer has violated the Civil Rights Act[6] when they have engaged in facially neutral employment practices that have significant adverse effects on protected groups even without proof of intent. The disparate-impact analysis may be applied to claims of discrimination caused by subjective or discretionary selection processes. Travelers discriminated against petitioner in the areas of

promotion and transfers. The evidence in applicant's summary judgment revealed that defendant admitted to certain unlawful discriminatory acts against blacks Americans and favored white Americans. Because of defendant's failure to respond to this evidence, there were no genuine issues of material facts. Therefore, petitioner was entitled to summary judgment.

5. The decision below conflicts with prior decision below regarding the right to trial by jury in discrimination cases.

This Honorable Court has implicitly held that the right to trial by jury shall by preserved. Applicant states that his constitutional right to trial by jury has been violated through summary judgment proceedings. The Seventh Amendment of the United States Constitution provides that:

> "In Suit of common law... the right of trial by jury shall be preserved inviolate."

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5. Federal Rules of Civil Procedure 56 provides that:

> (c) "Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with the **affidavits**, if any, show that there is **no** genuine issue as to **any** material fact and that the moving party is entitled to judgment as a matter of law."
>
> (e)"When a motion for summary judgment is made and supported as provided in this section rule, an adverse party may not rest upon the mere allegation or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, **if appropriate**, shall be entered against him."

According to Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed 2d. 260 (1974), the U.S. Supreme Court held that the Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action for damages. According to Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.ed 2d 988 (1959), this Honorable Court held that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care and ruled that plaintiff had a right to trial by jury. [See: Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 258, 69 S.Ct. 1067, 1069, 93 L.Ed 1347 (1949), the Supreme Court held that **trial by jury is a vital and cherished right integral in our judicial system,** and a waiver of this right must be meaningful, and should be interpreted, where possible, to avoid giving effect to dubious waivers of rights. Moreover, "as the right of jury trial is fundamental, we must indulge every presumption against waiver." In re Zweibon, 565 F.2d 742,746 (D.C. Cir 1977), the Court of Appeals stated that **Rule 38(d) was not "intended to diminish" the constitutional right to a trial by jury in civil cases, and should be interpreted, where possible, to avoid giving effect to dubious waivers**

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6. The Civil Rights Act of 1991 Section 105, 42 U.S.C.S section 2000e-2(k)(1)(A) provides that:
" An unlawful employment practice based on disparate impact is established under this title only if--

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

of rights. [See: Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed 1177 (1937); Borgh v. Gentry, 953 F.2d 1309, 1311 (**11th Cir. 1992**). A court's discretion to deny a jury trial is very narrowly limited and must, be exercised to preserve a jury trial. Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed. 2d 40 (1978).] In terms of discrimination and retaliation, according to Perkins v. Spivey v. General Motors Corporation, 911 F.2d 22 (8th Cir. 1990), the Eight Circuit Court of Appeals, remanded the entry of summary judgment on allegations of negligent retention of an employee, and ruled appellant must be given a jury trial. In Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S. Ct. 1331, 108 L.Ed 2d 504 (1990), the U.S. Supreme Court remanded the lower court's ruling dismissing appellant's discrimination case and entered a judgment on his retaliation claim. This Court held that when legal and equitable claims are joined in the same action, "the right to a jury trial on the legal claim, including all issues common to both claims, remains intact. Moreover, the U.S. Supreme Court in Bailey v. Central Vermont Railway 319 U.S. 350, 87 L.Ed. 1445 (1940), ruled that the right to trial by jury is a basic and fundamental factor of Federal jurisprudence and that where fair-minded men might reach different conclusions as to breach of duty, the question is for the jury. See: Roscello v. Southwest Airlines Company, 726 F.2d 217 (5th Cir. 1984), Ross v. Berhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), Cox v. C.H. Masland and Sons, Inc., 607 F.2d 138 (5th Cir. 1979). (Jury trial is appropriate in wrongful discharge actions.) Western Elec. Co. V. Milgo Elec. Corp., 573 F.2d 255, 257(5th Cir. 1978) cert denied. **(We must reverse judgments founded upon an unconstitutional denial of jury trial.)** Applicant strongly asserts that a jury may draw different conclusions contrary to the district court and therefore, a jury trial is necessary.

to the district court and therefore, a jury trial is necessary.

Furthermore, section 102 of the Civil Rights Act of 1991 42 U.S.C. 1981(a)(c) provides that any party may demand a **Jury Trial** if a complaining party seeks compensatory or punitive damages under this section.

According to Section 102, Title VII 1991, plaintiff may seek compensatory damages for future pecuniary losses, emotional suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. According to Landgraf v. USI Film Product, 507 U.S. _____ (1994), and in Wilson v. Belmont Homes, Inc., 970 F.2d (5th Cir. 1992) both the Supreme Court and the Fifth Circuit Court of Appeals held that Section 102 of the 1991 Civil Rights Act authorizes jury trial. The Courts concluded that a right to trial by jury is applicable to cases tried or litigated after the 1991 Civil Rights Act was enacted (November 18, 1991). On December 18, 1992, petitioner filed his case in Federal Court. According to Section 102, appellant has a constitutional right for a jury trial on the substantive and factual issues of discrimination. On September 24, 1993, appellant filed an **unopposed** demand for a jury trial by amending his petition under rule 15 of the Federal Rules of Civil Procedure[7] and as pursuant to the local rules of U.S. District Court for the Northern District of Georgia.[8]

On September 24, 1993, Petitioner served defendant a copy of the motion to amend.(See excerpts 16, R. 20 Vol. 1) There was no opposition to appellant's motion for a jury trial, thus, petitioner should have been granted a jury trial. The lower courts committed manifest injustice error by denying appellant's constitutional right to a jury trial. Again, according to In re Zweibon, 565 F.2d 742,746 (D.C. Cir 1977), the Court of Appeals stated that **Rule**

38(d)[9] was not "intended to diminish" the constitutional right to a trial by jury in civil cases, and should be interpreted, where possible, to avoid giving effect to dubious waivers of rights.

The lower courts deprived applicant's constitutional right to a jury trial. The magistrate should have allowed right to a jury trial because it is a constitutional right under both the 7th amendment of the U.S. Constitution and under the 1991 Civil Rights Act, and because the manifest injustice will result against applicant if he is not allowed a jury trial. In addition, the rights at issue here involve "the role of federal law in deciding an issue of great public concern: **"the procedural rights afforded victims of discrimination."** Kent v. Howard, 801 F. Supp 329, 336 (S.D.Cal 1992). Section 102 of the 1991 Act addresses the mechanisms by which victims of discrimination are to be made whole; it enhances the remedial rights of the plaintiff while leaving unchanged the substantive obligation of employers not to discriminate against employees on the basis of race and color. Tyler v Pennsylvania, Dept. of Revenue, 793 F. Supp 98, (MD Pa. 1992), Sussman v. Salem, Saxon & Nielson, P.A., 815 F. Supp 1447(MD Florida 1992). Petitioner asserts that the right to trial by jury is being obviated by summary judgment proceeding.

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7. Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend his pleading... by leave of court and leave shall be freely given when justice so requires.

8. Local Rule 220-1(b) states that:
"each party opposing a motion shall serve his response no later than 10 days after service of the motion. Failure to file a response shall indicate that there is **no opposition to the motion.**"

6. **The lower courts' decision conflicts with this honorable court and other circuits regarding summary judgment in connection with discrimination, constructive discharge and retaliation; and the right to a jury trial.**

When reviewing cases under Rule 56, the court must apply the general standard; that is, whether there is **any** genuine issue as to any material fact, whether movant is entitled to judgment as a matter of law, and **whether substantive law was applied correctly**. The record must negate any evidence that may call for a contrary result or evidence that might be developed at trial. The record is replete with disputed genuine issues of material facts, and therefore summary judgment is not appropriate. The District Court through Magistrate Harper relies on Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d. 176 (1962), to justify granting summary judgments in favor of defendant. Magistrate Harper's interpretation of these cases is incorrect and misplaced because these cases failed to address race discrimination in connection with summary judgment. The courts below incorrectly used the

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9. Rule 38(d) of the Federal Rules of Civil Procedure which provides that:
"any party may demand a trial by jury of any issue triable of right by jury by serving upon the other parties a demand... not later than 10 days after the service of the last pleading to such issues."

substantive law in **Celotex** (products liability wrongful death) to justify granting summary judgment in a discrimination case. The substantive law in product liability case is different from discrimination cases. You must apply summary judgment cases as it relates to racial discrimination. In **Celotex,** the facts revolved around whether a widow was entitled to a wrongful death action regarding exposure to asbestos.

In addition, the Eleventh Circuit Court of Appeals relied on Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), to justify granting summary judgments in favor of the appellees. The lower courts misinterpreted the language in **Anderson** and incorrectly applied it to the instant case. In **Anderson,** this Honorable Court addressed the governing substantive law and the standard of proof to be applied in summary judgment cases regarding public-figure libel actions. The governing substantive law and the standard of proof in **Anderson** are different in discrimination cases. This Court required that if the non-movant shows the existence of any genuine issues for trial, the motion for summary judgment must be denied. Furthermore, in **Anderson,** this Court held that "inferences to be drawn from the underlying facts contained in the **evidential sources** submitted to trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."[also see Matsushita Elec. Ind. Co. v. Zenith Radio Corp, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).]

This Court held that material facts are those "that might affect the outcome of the suit under the '**governing law**'..." and clarified the term "genuine issue of material fact" as follows as to materiality, the **substantive law** will

identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the **governing law** will properly preclude the entry of summary judgment. 477 U.S. 248. In **Anderson**, the Supreme Court held that a summary judgment will not lie "if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable **jury** could not return a verdict for the non-moving party." 477 U.S. 249.

This Honorable Court was clear that the court's ruling on a summary judgment motion must apply the **evidentiary standard of proof of the substantive law applicable to the case.** In **Anderson,** this Court held that a ruling on a motion for summary judgment must be guided by **the New York Times "clear and convincing" evidentiary standard** in determining whether a genuine issue of actual malice exists--that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.

Petitioner strongly asserts that the lower courts incorrectly applied the standard of review in **Anderson,** to the instant case because it used evidentiary standard of proof of the substantive law of libel case, instead of the substantive law and standard of proof of discrimination cases. In the instant case, the inquiry must be whether a reasonable **jury** could find **by a preponderance of the evidence** with indirect evidence inference of discrimination. The standard of proof by a preponderance of evidence is that it is more likely than not a reasonable person would find that there was discriminatory intent,

7. The decision below conflicts with prior decisions of this Court regarding 1964 Civil Rights Act as amended in 1991.

The 1991 Civil Rights Act constitutes an innovation

of defining discriminatory practices as "indirect action of discrimination. The courts below erred by failing to apply the **governing laws** regarding discrimination and constructive discharge in connection with summary judgment. In discrimination cases such as this one, the governing law includes the "method of ... presumptions and shifting burdens of production" set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); United States Postal Service Board of Governor v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); Saint Mary's Honor Center v. Hicks., 509 U.S.____ , 113 S.Ct.___ , 125 L.Ed. 2d 407 (1993) and their progeny. The United States Supreme Court set forth guidelines to analyze discrimination claims in **McDonnell Douglas Corp.** This Honorable Court held that to establish a prima facie case of employment discrimination, plaintiff must show by a **preponderance of the evidence** (more likely than not) that the defendant discharged him "under circumstances which **gave rise to an inference** of unlawful discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U. S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed. 2d 207 (1981).

Although, the above statutes and cases address the evidentiary standard of proof and the substantive law of discrimination, they failed to address discrimination involving summary judgments.

8. Below are specific cases on point when reviewing summary judgment involving discrimination.

The only U.S. Supreme Court case that comes close to addressing summary judgments in connection with discrimination is Adickes v. Kress & Co., 398 U.S. 144,

90 S.Ct. 1598, 26 L.Ed. 142 (1970). In **Adickes,** the Supreme Court ruled against summary judgment in discrimination cases (conspiracy to discriminate).

Furthermore, appellant cites Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct 486, 7 L.Ed. 458, 464 (1962), Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Circuit 1991), Hayden v. Rand Corp, 605 F.2d 453, 455 (9th Cir. 1979), as primary authority for the rule that summary judgment should be used sparingly in complex litigation where **intent and motive** play leading roles. The U.S. Supreme Court concludes that "it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. The Supreme Court goes on to say that "**Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even-handed justice."** Furthermore, summary judgments should be precluded, if the factual issue concerns the defendant's motive and should be decided by the trier of fact.(a jury) Benson v. Allphin, 544 F. Supp. 464 (1982), Conrad v. Delta Airlines, Inc., 494 F.2d. 914 (7th Cir. 1974), Mount Healthy City School District v Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 471 (1977).

9. The lower courts' decision conflicts with other circuits regarding summary judgments in connection with discrimination.

In Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Circuit 1991), the 8th Circuit remanded the employment discrimination issue and held that the lower court erred in granting the employer a summary judgment on the discrimination issue. The 8th Circuit held

that summary judgments should seldom be used in cases alleging employment discrimination because of the special category in which Congress and the United States Supreme Court visualized these cases. The 8th Circuit stated that "Knowing that discrimination is difficult to prove by direct evidence, employment discrimination cases require a 'simplified proof from a claimant in order to create an inference of discrimination and thereby establishing a prima facie case' Hillebrand v. M-tron Indus., Inc., 827 F.2d 363, 364-366 (8th Cir. 1987), **cert denied** 488 U.S. 1004, 109 S.Ct. 782, 102 L.Ed.2d 774 (1989)at 827 F.2d 364-366. Summary judgments should be used only in those rare instances where there is no dispute of fact and where there exists only one conclusion. All the evidence must point one way and susceptible of no reasonable inferences sustaining the position of the non-moving party. [See: Leichihman v. Pickwick Int'l, 814 F.2d 1263, 1268 (8th Cir.) **cert denied** 484 U.S. 855, 108 S.Ct. 161, 98 L. Ed.2d 116 (1987) Halgof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 495 (8th Cir. 1990)]

The 3rd Circuit Court of Appeals is against using summary judgments in discrimination cases. The 3rd Circiut in Jackson v. University of Pittsburgh, 826 F.2d 230 (3rd Cir. 1987), reversed the district's court entry of summary judgment for defendants and remanded the issue for trial on the merits. The 3rd Circuit held that at the summary judgment stage, in other words, "all that is required for a non-moving party to survive the motion is that sufficient evidence supporting the claimed factual dispute be shown to require a jury to resolve at trial the parties' different versions of the truth...." First Nat'l Bank of Ariz. v. Cities Services. Co., 391 U.S. 253, 288-89, 88

S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

In **Jackson,** the Court concluded that currently, blatant acts of discrimination can easily be identified and rectified. However, much of the discrimination that remains is indirect and resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without direct evidence. This is one of the reasons why our legal system permits discrimination plaintiffs to prove their cases by either **indirect evidence** or direct evidence. United States Postal Serv. Bd of Governors v. Aikens, 460 U.S. 711, 714, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The 3rd Circuit Court of Appeals concludes that because intent is a substantive element of this cause of action--generally to be inferred from the facts and conduct of the parties---the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility. 826 F.2d 233.

The 2nd Circuit U.S. Court of Appeals is against using summary judgments in connection with discrimination. Petitioner cites Rosen v. Thornburgh, 928 Fd.2d 528 (2nd Cir. 1991). In **Rosen,** the 2nd Circuit Court reversed the lower court decision in granting defendant's motion for summary judgment, and recognized that employment discrimination is often accomplished by discreet manipulation and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a "smoking gun," such as a notation in an employee's file, attesting to a discriminatory intent. A victim of discrimination is, therefore, seldomly able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of

circumstantial evidence. The Court concluded that a jury will be in a better position to determine whether the defendants did or did not discriminate.(pg. 533).

Petitioner strongly asserts that because the motive and intent are the substantive issues, it is more likely than not that a jury would find disputed genuine issues of material fact. Since in discrimination cases, inference of discrimination is allowed, the use of irregular procedures supports an inference of discrimination. Walker v. Pettit Construction Corp., 605 F.2d 128, 131 (4th Cir. 1979).

10. The decisions below conflicts with other circuits regarding Section 704 of Title VII, 42 U.S.C. Section 2000(a) (anti-retaliation statute) [10] and constructive discharge policy.

Section 704(a) creates a uniquely federal right that makes it unlawful for an employer to retaliate against an employee who has engaged in Title VII protected activity. The purpose of the anti-retaliation statute is to ensure an employee's protected to challenge discrimination and retaliation, whether in form of subsequent discharge or court proceeding which places **added cost on the a exercise of those rights and as such has a "chilling effect"**. Pettway v. American Cast Iron Pipe Company, 411 F.2d 998 (5th Cir. 1969), and EEOC v. Levi Strauss & Co., 515 F.Supp. 640 (N.D. Illinois, E.D. 1981). TheCivil Rights Act of 1964 and 1991 applies to constructive discharge. Held v. Gulf Oil Co., 684 F.2d 427, Derr V Gulf Oil Co., 796 F.2d 340 (10th Cir. 1990). To show constructive discharge, a plaintiff "must prove that his working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Wardwell v. School Board of Palm

Beach County, 786 F.2d 1554, 1557 (11th Cir. 1986), Lynch v. Freeman, 817 F.2d 380 (6th Cir 1987). Petitioner's , affidavit, and pleadings shows that the defendant forced petitioner to resign. Furthermore, the court proceedings made it difficult to prove discrimination.

11. The lower courts decision conflicts with this court's ruling regarding 42 U.S.C. SECTION 1981[11] and the Patterson decision.

The purpose of the 1991 Civil Rights Act was to reverse or modify several recent Supreme Court decisions, including Patterson v. McClean Credit Co., 491 U.S. 164, 109 S.Ct. 2363 (1989). The CRA of 1991 amended five civil rights acts, and restored the law to the position in which it was prior to **Patterson**. In Rivers v. Roadway Express Inc., 507 U.S. ___ , (1993) No. 92-936, this Court held that Section 101 of the 1991 Civil Rights Act does not apply to cases that arose before it was enacted. Ironically-- however, the Supreme Court immediately, applied the **Patterson decision** retroactively. See: Weaver v. Casa Gallardo, 922 F. 2d 1515 (1991), Williams v. First Union National Bank of N.C., 920 F.2d 232 (1990).

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10. Section 704(a) of Title VII, 42 U.S.C. section 2000e(a) of the Civil Rights Act provides as follows:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings: It shall be an unlawful employment practice for an employer to discriminate against any of his employees.... because he has opposed any practice made by an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, **proceeding**, or hearing under this subchapter.

Welmer v. Tennessee Eastman, a division of Eastman Kodak, 919 F.2d 1160 (1990), Prather v. Dayton Rowee and Light Co., 918 F.2d 1255 (6th Cir 1990), and Hill v. Goodyear Tire & Rubber Inc., 918 F.2d. 877 (10 Cir. 1990). It would seem logical and consistent that this Court apply the Civil Rights Act of 1991, 42 U.S.C. Section 1981 as amended, retroactively as this Honorable Court did when **Patterson** was decided in 1989.

Nevertheless, even if the **Patterson case** is controlling, petitioner's case is actionable under 42 U.S.C. Section 1981, 42 U.S.C. Section 1981 (b) because discriminatory promotion claims are actionable under 1981, if promotions rise to the level of an opportunity for a new relation between employee and employer. Patterson v. McClean Credit Co., 491 U.S. 164, 105 S.Ct. 2363 (1989) Petitioner was entering into a new employment relationship with defendant to be transfered/promoted to an entirely new region with new terms, new salary, new local policy. Petitioner's action is actionable because Respondent refused to enter into an employment contract based on race.

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11. 42 U.S.C. SECT. 1981 as amended provides that:

a. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens... ."

b. "For the purpose of this section, the term' make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privilege, terms, and conditions of the contractual relationship."

c. "The rights protected by this section are protected against impairment of nongovernmental discrimination and impairment under color of law."

IV. CONCLUSION

The U.S. District Court's decision affirmed by the Eleventh Circuit U.S. Court of Appeals allowing summary judgment in discrimination cases violates and circumvents the right to trial by jury and is in contravention to the Civil Rights Act. The Courts are drifting into clear and present danger when it circumvent a U.S. citizens constitutional rights to trial and trial by jury. The lower courts decision conflicts with the decision of this Honorable Court and decisions of the Eight Circuit Court of Appeals, the Second Circuit Court of Appeals, and the Third Circuit Court of Appeals regarding summary judgments in connection with discrimination. Again, according to Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 142 (1970), this Court ruled against summary judgment regarding discrimination and revealed the importance of the trial by jury. Justice Black's in a concurring opinion, stated that the right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision--jury trial in Civil cases. Justice Black goes on to say "**the advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.**"

It is difficult to effectuate and vindicate the 1964 Civil Right Act when the system is geared towards failure, frustration, and difficulty in financing the litigation. The agency that was designed to assist-- hinders the process by delaying the investigation for almost two years. In addition the courts place a heavy burden on plaintiff's to

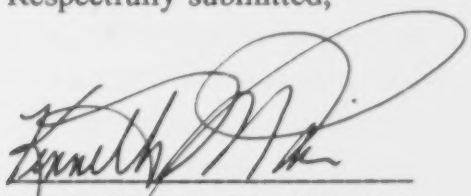
prove his or her case in court proceedings, and make it difficult to try the case before a jury. In this particular instance, the U.S. District Court for the Eastern District of Louisiana transferred the case to the Northern District of Georgia. The Northern District of Georgia appoints the magistrates without consent to dispose of the case through summary judgment proceeding. It is higly irregular to deny petitioner's motion for summary judgment and grant defendant's motion for summary judgment. Logic does not flow from the magistrate decision because if one denies a motion for summary because there are disputed facts, then it is improper and unconscionable to grant a motion from summary judgment on the same set of laws and facts. It is irregular to deny petitioner's unopposed motion for a jury trial. It is irregular to apply the local rules in contravention to the Federal Rules. It is irregular to affirm the District Court's judgment without oral argument and by failing to publish the opinion. The significance of not publishing the reasons for the decision gives credence to the assertion that many Americans have-- that is, the courts are not to be trusted because they are maintaining the status quo and allowing discrimination to continue. How can the judiciary expect America to respect the law and constitution when the courts are not respecting the individual rights of the constitution. America is in an unhealthy state of denial.

Clearly, it is the legislative's intent to provide equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, because of discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions, the foundations of a free democratic state, and threatens

the peace, order, health, safety, and general welfare of the state and its inhabitants. Turner v. City Monroe, 634 So.2d 981 (La. App. 2 Cir. 1994).

Plaintiff has established by direct and indirect evidence that defendant discriminated against him. Petitioner prays that this Honorable Court grants the petition for writ of certiorari and prays that the lower courts' decision be reversed and remanded.

Respectfully submitted,



KENNETH M. PLAISANCE
2067 NORTH MIRO ST.
NEW ORLEANS, LA 70119
504 945-4176

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I herby certify that on this 18th day of August, 1995, fourty copies of the above and foregoing Petition for Writ of Certiorari were mailed to the Clerk of the Supreme Court of the United States of America, Washington D.C. I certfiy that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the person(s) identified below by depositing the same in the United States mail at New Orleans, Louisiana, first class, postage prepaid, and properly addressed to

Attorney for defendant/respondent
John F. Wymer, III
Powell, Goldstein, Frazer & Murphy
Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303

KENNETH M. PLAISANCE
Pro Se

APPENDIX

1. Court of Appeal Decision, May 24, 1995

2. Trial Court Memorandum Decision, May 23, 1994

3. Order from the U.S. District Court for the Eastern District of Louisiana

4. Article IV Section 1 of the United States Constitution, 28 USCS section 1738, Full Faith and Credit Clause

5. Seventh Amendment of the U. S. Constitution

6. Rule 36 of the Federal Rules of Civil Procedure

7. Rule 56 of the Federal Rules of Civil Procedure

8. 28 U.S.C. Section 1652

9. 28 U.S.C. Section 2071

10. Section 704 of Title VII, 42 U.S.C. Section 2000(a) of the Civil Right Acts

11. 42 U.S.C. Section 1981(a) (c)

Filed May 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8719

District Court Docket No. 1:93-CV-1021

KENNETH M. PLAISANCE,

Plaintiff-Appellant,

versus

TRAVELERS INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH, DUBINA AND BARKETT, Circuit Judges.

J U D G M E N T

This cause came to heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was take under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 24, 1995
For the Court: Miguel J. Cortes,
by: Karleen McNable

ISSUED AS MANDATE; 6/26/95

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Kenneth M. Plaisance, Plaintiff,	:	
vs.	:	**CIVIL ACTION NO.** 1:93-cv-1021-RLV
Travelers Insurance Co., Defendant.	:	

JUDGMENT

This action having come before the court, Honorable Robert L. Vining, Jr., United States District Judge, for consideration of the defendant's motion for summary judgment, and the court having granted the defendant's motion, it is

Ordered and adjudged that the plaintiff take nothing, that the defendant recover its costs of this action, and the action be, and the same hereby is **dismissed**.

Dated at Atlanta, Georgia, this 23rd day of May , 1994.

Luther D Thomas, Clerk

By:_____
Sherry Gibbons
Deputy Clerk

Prepared, Filed and Entered
in the clerk's office
May 23, 1994,
Luther D. Thomas, Clerk

By:_____
Sherry Gibbons
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	*	
	*	CIVIL ACTION
KENNETH M. PLAISANCE	*	NO. 92-4184
Plaintiff	*	SECTION "M"
VERSUS	*	JUDGE BEER
	*	MAGISTRATE 1
TRAVELERS INSURANCE	*	MAGISTRATE
	*	LEMELLE
Defendant	*	
	*	

ORDER

It appearing to the Court that Defendant's Ex Parte Motion for Enlargement of Time is well taken, it is

ORDERED that Defendant, The Travelers Companies, by and is hereby granted a thirty (30) day extension of time from the date this Court enters judgment on Defendant's Motion to Dismiss for Improper Venue and for Failure to State a Claim upon which Relief can be Granted, within which to respond and/or object to Plaintiff's Interrogatories, Request for Admission of Facts and Request for Production of Documents.

NEW ORLEANS, LOUISIANA, this 10th day of March, 1993.

_____

UNITED STATES MAGISTRATE JUDGE

Article IV Section 1 of the United States Constitution, 28 USCS section 1738, Full Faith and Credit Clause Provides: (In Pertinent Parts)

> "The records and judicial proceedings of any court of any such States, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States. Such Acts, records and **judicial proceedings** or copies thereof, shall have the same **full faith and credit** in every court within the United States as they have by law usage in the courts of such State, from which they are taken."

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In Suit of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be perserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 36 of the Federal Code of Civil Procedure provides:

> (a) **Request for admission.** A party may serve upon any other party a written request for the admission, of the truth of any matters within the scope of Rule (26) set forth... Each matter of which an admission is requested shall be separately set forth. **The matter is admitted unless. within 30 days after service of the reque t,...** the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter.... a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint....
>
> (b) **Effect of Admission.** Any matter admitted under this rule is conclusively established....

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceeding thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgmen sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examing the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent

to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue at trial. If the adverse party does not so resond, summary judgment, **if appropriate**, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are present in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the

other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

28 U.S.C. SECTION 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. Section 2071

The local rules of the District Courts shall be consistent with the rules of practice and **procedure** prescribed by the Supreme Court.

Section 704 of Title VII, 42 U.S.C. section 2000(a) of the Civil Right Acts provides that:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made by an unlawful employment practice by this subchapter**, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, **proceeding**, or hearing under this subchapter.

42 U.S.C. SECTION 1981(a)

"(c) Jury Trial.-- If a complaining party seeks compensatory or punitive damages under this section---

(1) any party may demand a trial by jury"